FILED

93-303

Number _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

James E. Carter &
Shirley L. Carter, Petitioners,

v

United States of America and
Gary Jones, Revenue Officer of the
Internal Revenue Service, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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July ___, 1993

QUESTIONS PRESENTED

1. Do the constitutional standards of due process for pleading, as applicable to a tax investigation action, require a petitioner to aver:

a. the legal authority that informs the respondent what individual conduct on his part imposes legal responsibility for, or makes him subject to, a specific tax, and submit this authority/issue of law (of whether the respondent is a "taxpayer") to contestation ?

b. what must be proven at trial/hearing in clear and unequivocal language ?

2. If true, (and neither the government's brief nor any court document has ever suggested they are not true), can these constitutional standards properly be negated or ignored by the court of appeals by reliance on a statute and upon obiter dicta by this court ?

QUESTIONS PRESENTED (continued)

3. Is jurisdiction (contingent by statute upon "appropriate process") properly invoked by a form identified as a petition but void of legal substance required by due process ?

4. In addition to statutory authorization, must a federal taxing agency trace any asserted authority for taxation directly to a constitutional provision to invoke the jurisdiction of a court ?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners James E. and Shirley L. Carter respectfully requests that a writ of certiorari issue to review the opinion / denial of rehearing / denial of rehearing en banc of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 17, 1993, April 16, 1993, and June 2, 1993, respectively.

OPINION BELOW

The opinion of the Court of Appeals is in the appendix (A - 1) and is reported as 995 F2d _____. The orders denying rehearing and rehearing en banc are on page A - 7. The Report and Recommendation by Chief U.S. Magistrate Judge John T. Maughmer is at page A-37.

JURISDICTION

The opinion of the Court of Appeals was entered on March 17, 1993. A timely petition for rehearing was denied on April 16, 1993. A petition for rehearing en banc was delivered to the court within 14 days of April 16, and was denied as untimely on June 2. This petition for certiorari is presented to this court within 90 days of April 16. This court's jurisdiction for review is invoked under 28 USC §1254(1).

LAWS INVOLVED

The Fifth Amendment of the Constitution of the United States of America and statutes 26 USC §7402(b) and §7604(a) are reproduced in the appendix.

STATEMENT OF THE CASE

Two cases were initiated by service of "Petition to enforce internal revenue service summons" (p. A - 29), on the Carters by mail on or about June 5, 1989. Jurisdiction is averred to be invoked pursuant to 26 USC §§7402(b) and 7604(a). The petitions refer to "an investigation into the tax liability of" the respondents (para IV) and "collect(ing) the Federal tax liability of" the respondents (para X) as the ultimate objectives.

Carters filed motions to consolidate on July 5, 1989 and the cases were consolidated by order dated August 7, 1989.

Carters also filed motions for a more definitive pleading and/or motion to dismiss on July 5, 1989, pointing out that there was no legal authority cited "that may impose a legal liability on the respondent" nor an averment that "the respondent may be lawfully subject to a specific legislated

tax imposed by Title 26 and as authorized by specific constitutional provision," and that "no cause of action has been stated."

The magistrate denied the motions on the grounds that enforcement of the summons would not violate Fourth Amendment rights.

A hearing was held on November 28, 1989, and Carter again brought to the court's attention that no specific tax has been identified. The court responded: "All right. We'll address that in just a moment." Tran. p5. Carter pointed out that the grounds raised in the motion to dismiss (there was no claim the Carters had a legal responsibility to pay any tax) had not received a definitive ruling by the court. Tran. p6. Upon request by Carter "to identify in the petition where (the plaintiff) requests the information for an income tax" (Tran. p7), the court responded: "(W)ell, Title 26 of the United States Code is the provision of the United States Code

which imposes federal income tax and it's my belief that that's the tax which they are investigating in this case. Mr. Josephson, are you in fact investigating income tax for these two individuals for the years specified in the petition?" Mr. Josephson: "Yes, sir, (and the evidence will show) the Carters' income was in excess of the statutory minimums for filing returns." Tran. p7. and again "their levels of income were such as to put them in excess of the minimum filing requirements ..." id p8. There are no filing requirements mentioned in the petition.

The Carters objected that such statutes should be cited in the petition where they could be contested. id p9. The court responded: "Mr. Carter, the rules of federal and civil procedure are very lenient in what they require in the statement of a complaint or petition filed in federal court. Under the rules and standards

applicable to the filing of those petitions and complaints, I have determined that the petition filed by the United States is sufficiently definitive for purposes of going forward in this case..." id p9.

Carter continued: "We have not been able to find at this time . . . what provision in there makes an individual liable. Would the counsel be so good as to inform us as to what section of Title 26 imposes liability of the income tax." Mr. Josephson thereupon suggested letting the revenue officer testify. id p 11.

Carter continued: "The ruling of the Court is that there is no need for the complainant to identify the particular tax, is that correct?" The Court: "The ruling of the Court is as stated in the October 5 order and your motion is denied and I've ruled that the petition for enforcement is sufficient on its face and that's the basis of my order." id p 12.

The government's witness then introduced evidence of bank deposits made by the Carters. The evidence does not relate to any averment.

Carters filed a motion to dismiss on November 14, 1990, pointing out that "the statute that delineates the event/occurrence imposing legal liability of the unstated tax" has not been identified, that there has been no "claim at law (that) brings the individual involved within the ambit of (subject to) the IRS," and that absence of these legal provisions "constitute a denial of due process."

The magistrate entered a report and recommendation that the summons be enforced on November 4, 1991, relying heavily upon fulfilling the standards enumerated in United States v LaSalle National Bank, 437 US 298 / United States v Powell, 379 US 49. (page A-37, infra)

Carters filed objections January 16, 1992, quoting the Magna Charta: "No freeman shall be (bothered by the king except) by the law of the land," and that this right has been incorporated into contemporary due process (id p3); that due process requires government impose burdens on the citizens only in accordance with valid laws of the land citing Giaccio v Pennsylvania, 382 US 399, and no law has been averred/shown that makes the Carter's subject to an income tax (id. p5); that respondents are "to be able to prepare his defense without making inference or deductions from pleadings and much less to rely on assumptions from attached exhibits. 61A Am Jur2d Pleadings #32, citing Garrett v Louisville N.R. Co., 235 US 308" (id p5); that "due process requires legislation to be sufficiently explicit to inform those who are subject to it what conduct on their part will render

them liable to its provisions" citing Kay v US, 303 US 1, among others. id p6.

On February 5, 1992, Judge Whipple ordered the report and recommendation be adopted.

Carters filed a motion to modify judgment and motion to dismiss and "reiterated the lack of any law being cited by the Petitioner that imposes any tax or avering the respondents are legally liable for any tax"; that "the right to due process and be informed of the law that imposes a duty upon a citizen" is applicable to a tax summons; and that a challenge to an "essential allegation that the right to be enforced is consonant with the (law) constitutes a primary issue of law which must be determined at the outset of litigation," and "it is the responsibility of the court to rule on questions of law." citations omitted.

Judge Whipple denied the motions on April 27 and notice of appeal was filed on June 26, 1992.

Carter's Brief on appeal presented five questions relating to the legal adequacy of the petition. LaSalle and Powell were analyzed to have established the legal responsibilities under the tax code with specific references to taxes within Subtitles A thru E as part of the "legitimate purpose" prior to discussing factual issues. The additional standards were suggested to be supplemental criteria for factual issues. A reading of the cases that negates a petitioner's obligation to plead the lawful authority required by due process was suggested to not be supported by the cases. id 7 - 10.

The historic origin of 26 USC §7602 was reviewed and revealed that prior to the recompiling in 1954 (which was done without material change), the statute clearly

required the government to show the citizen was liable-by-law before enforcement of a summons. Recent appellate court adjudications of summons enforcement were shown to construe "liable" as referring to an issue of liability-in-fact (books and records of respondents) and such adjudication is hense inapplicable to the instant questions of law. The cases were questioned as maintaining the legislative intent. id 11 - 14.

The requirements of due process were discussed on pages 14 to 20 and included "it is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision...does not meet (the due process standard of Mullane v Central Hanover Bank, 339 US 306)," Bell v Burson, 402 US 535, 542; and "A variance between pleading and proof that affects the substantial rights of

parties is ground for reversal." citing Berger v US, 295 US 78.

The government's Brief identified the Carters as "taxpayers" over 70 times on the basis they were respondents (id p1) and suggested on pages 10 to 12 that a mere exhibit attached to the petition fulfills notification requirements but was unable to offer even one supportative authority. The government adknowledged that no statute imposing a tax liability had been previously cited by suggesting, in a footnote on page 13 (where it was long past the point of being submitted to contestation) that Section 1 of Title 26 may be one of the missing legal authorities. The government suggested that lack of filed forms was sufficient cause to enforce the summons. The brief additionally relied heavily upon numerous appellate cases following United States v Powell, 379 US 48, and the use of affidavits attached to petitions.

Carters' Reply vigorously objected to the appellation of "taxpayers" on the basis that the identification, statutorily defined by 26 USC §7701(a)(14) as an individual subject to a tax, was an issue before the court. id p6. Powell's use of affidavits was analyzed to be relevant to an issue of fact but that an affidavit of law is an inane concept: that if the following appellate cases may be interpreted to apply to an issue of law, it is an inadvertant over-extension. The government's logic appears to be that affidavits of fact relieve/fulfill requirements to plead legal responsibility. id 7 - 10. Cases relating to a lack of filed forms were analyzed to indicate the action raised suspicion, but was nowhere found to alter/ negate a constitutional right or relieve the government's responsibility to aver a legal responsibility. The concept that a prima facie case (a case ready for the jury) has

been shown when there has never been any law averred/ evidenced that imposes a legal responsibility on the respondent was questioned. id p8.

The Opinion of the court of appeals relied on the summons authority of 26 USC §7602 and on fulfilling the standards of LaSalle/ Powell to affirm the district court's enforcement. Due process and constitutional rights were not addressed. page A - 1.

The court denied Carters' petition for rehearing and a subsequent petition for rehearing en banc was denied as untimely. page A - 7. The question of whether the statutory requirement for jurisdiction to be acquired "by appropriate process" includes petitions that do not fulfil due process standards was presented. The Petition for Rehearing En Banc is reproduced in the appendix (page A - 8) to show due process claims were presented.

This petition for writ of certiorari is presented to the court within 90 days of April 16, 1993.

REASONS FOR GRANTING THE WRIT

The instant issues transcend a mere conflict with innumerable holdings of this court. We are confronted with a repudiation of a most basic right of free men, evolved over more than seven hundred eighty years, wrested from obstinate monarchs at the point of a sword, and enshrined in secured enclaves of law in the manner of a civilized society. 16A Am Jur2d Constitutional Law §806; Ochoa v Morales, 230 US 139; Mugler v Kansas, 123 US 623; Munn v Illinois, 94 US 113; Robertson v Baldwin, 165 US 275; Brown v Walker, 161 US 591.

The due process clause of the Constitution of the United States is one of the few rights that can be directly traced to a specific clause of the Magna Charta. The 39th Chapter reads: "No freeman shall be taken, or imprisoned, or disseised, or

outlawed, or exiled, or anywise destroyed, nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." This right was extended to all British citizens in 1354 and has been incorporated into the due process clause of the Fifth Amendment. Knoxville Iron Co v Harbison, 183 US 13; Ingraham v Wright, 430 US 651.

It was a guarantee that the king would not dare set his foot across the threshold of a peasant's hovel. No matter how shaky the door stile or how leaky the roof, the king could not impose. The power that the king had at his beck and call was insufficient; the requirement was that the peasant's tranquility was not to be disturbed unless he had violated a law or failed to fulfill a lawful responsibility. Cooley, Constitutional Limitations, pp 351, 355. The entire purpose for Magna Charta

was to prevent arbitrary actions by the king, and the 39th. chapter in particular was intended to prevent arbitrary confiscation of property/imprisonment under guise of a tax enforcement; that the individual is to be left alone unless the government shows good cause to disturb his tranquility. Tehan v Shott, 382 US 406, 416; Dent v West Virginia, 129 US 114; Eisenstaddt v Baird, 405 US 438. This court, in construing the law, will harken back to the purposes for the creation of the law. Michigan v Tucker, 417 US 433; Whitman v Oxford National Bank, 176 US 559; US v Classic, 313 US 299; Powell v Alabama, 287 US 45.

The government has the power of a summons and claims, upon that power alone, access to the innermost privacy of the peasant's possessions. When we consider a police department, we approve the power of

deadly force, but the exercise of such power must be for authorized objectives. ref. Screws v US, 325 US 91. Similarly, when we consider a tax collection agency, we approve the power of a summons. But the exercise of this power must also be for authorized objectives---such as the collection of taxes. The use of power without showing a lawful objective is an abuse of power. The lawful objectives of the I.R.S. are the determination and collection of taxes in Subtitles A thru E and none of these authorized objectives/"legitimate purposes" have been averred and put into contestation by the government in this case. This court is neither concerned with power or jurisdiction, but with their exercise pursuant to authority. Kinsella v US, 361 US 234.

In colonial times, our forefathers were faced with officials who could enter any building without any showing of probable cause and ransack the premises in search of evidence that the occupant may be involved in a crime or may owe taxes. The general warrant used by the Crown has been suggested by this court to be one of the major reasons that lead to the Revolutionary War. Lopez v US, 373 US 427, 454. Dis. op. It would appear that the enforcement of a summons that does not inform the citizen of the legal authority for the demanding of personal documents, and allow the citizen to challenge that legal authority, bears a strong resemblance to a general warrant. ref. T. Taylor, Two studies in Constitutional Interpretation, 41 (1969).

The government cries: "To collect taxes!!" but refuses to identify a tax. The government cries: "To determine

liability!!" but refuses to aver a law and accuse a citizen of being lawfully responsible for a tax. If a citizen can be told the law justifies the compelled production of books and records, but never be told the relevant law, there really need be no law, and we have reduced our society from a government of law to a government of men (cf Jones v Securities & Exchange Commission, 298 US 1), who can interpret---or extrapolate---any proviso in an arbitrary self-serving manner and have it enforced in a manner that cannot be contested. A basic purpose of due process is to prevent arbitrary action by government. Mallow v Hogan, 378 US 1; 16A Am Jur2d Constitutional Law, §816.

The very fact that the government adamently refuses to declare the law so it can be contested tends to arouse suspicion. It is the responsibility of the petitioner

to aver the law that imposes a responsibility. 61A Am Jur2d, Pleading §71. Does fear that the tax may be vulnerable motivate a frenzy of stonewalling? Or is it mere efficiency? This court has declared "the Due Process Clause in particular (is) designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v Illinois, 405 US 645. It has long been recognized by this court that the power of taxation, when abused, can become a most destructive force to self-destroy a viable society. Loan Association v Topeka, 87 US 655.

Without an averment of legal responsibility, and the acts that impose legal responsibility, the procedure of a

hearing is superfluous. Regardless of what facts are evidenced at a hearing, they can be ruled to fulfill legal requirements (that have never been established) and the respondent is left with no legal recourse. And due process' essential element of fundamental fairness has been totally annihilated. Snyder v Massachusetts, 291 US 97.

Let's be candid: the instant action is styled as the enforcement of a summons, yet the purpose is to enforce a tax but the tax is not even identified. The adjudication by this court that the constitutional guarantee of due process requires a pleading to have sufficient clarity so that it can be contested or else the court cannot judicially act upon them as a ground for decision (US v Merriam, 263 US 179, 188) and a multitude of other due process requirements as adjudicated by this court

were presented to the court of appeals in the Brief and a few were reproduced in the Petition for Rehearing En Banc. (The petition for rehearing en banc is reproduced in the appendix to show due process issues were presented to the appellate court as required. California v Taylor, 353 US 553, 557) These numerous holdings of due process requirements were not considered by the court of appeals.

If basic constitutional rights cannot be obtained by litigation, they are obviously not available to the citizens. If constitutional rights are unavailable, the constitution has become a worthless scrap of paper and our form of government has been fundamentally altered. If our government has been so changed, citizens should not be teased with sanctimonious platitudes as justice, liberty, and freedom. If government can force a citizen to preform an

act, any act, without evidencing any legal justification for its requirement, we live in the land of the permitted, not the land of the free. We are permitted to be undisturbed in our homes, our person, our possessions, only if we servilely comply with the whim and caprice of an army of bureaucrats waving administrative forms but refusing to evidence their authority other than the power of confiscation, incarceration, and, ultimately, the muzzle of an agent's gun. Let us pray our nation has not regressed to such a tyranny.

The action by the court of appeals in not considering constitutional requirements of due process when adjudicating the enforcement of a government summons is in direct conflict with directives of this court. In Upjohn v US, 449 US 383, this court stated "the obligation imposed by a tax summons remains subject to the

traditional privileges and limitations." at 398, and in US v Euge, 444 US 707, this court declared the authority claimed by #7602 is not to be "in derogation of any constitutional rights." id 711. Constitutional rights are the paramount authority of the land. Marbury v Madison, 5 US 137; Watson v Memphis, 373 US 526; National Mutual Insurance v Tidewater, 337 US 582.

The court of appeal's stated the Carters are "taxpayers" (without any legal justification) and hense, via 26 USC #7701(a)(14), they are subject to a tax without the government submitting any legal authority to contestation/ajudication. This conflicts with Flora v US, 362 US 145, and Spreckles Sugar v McClain, 192 US 397. The court additionally did not comply with the holding of this court that a federal revenue agency must directly trace their authority

to a constitutional provision to invoke the jurisdiction of a court. United States v Hill, 123 US 681, 686. Ref. Carters' Brief p22.

The action of the court of appeals appears to even be inconsistent with each justice's oath of office "to uphold the Constitution of the United States."

{A discussion of jurisdictional issues is made in the Petition for Rehearing En Banc, page A - 10 to 15, infra. If this court does not take judicial notice that usurping jurisdiction is the quintessential of tyranny, additional discussion would be blowing in the wind.}

CONCLUSIONS

For these reasons, it is submitted a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.